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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 257

LUCILLE A. BREECE, administratrix *ad prosequendum* of the Estate of JERRY C. BREECE,

Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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28 U.S.C.A.:

Sec. 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ____

LUCILLE A. BREECE, administratrix *ad prosequendum* of the Estate of Jerry C. Breece,

Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on April 17, 1962.

Opinions Below

No opinion was rendered by the District Court, but the judgment of that court is printed in the Record (R429).*

The opinion of the Court of Appeals is unreported, but is printed in the Appendix (A1a).**

---

* Page references to the Record ("R") refer to the Appendix filed with the Appellant's Brief in the Court of Appeals.

** Page references to the Appendix ("A") refer to the Appendix annexed to this petition.

Jurisdiction

The Judgment of the Court of Appeals was entered on April 17, 1962. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. §1254(1).

Questions Presented

1. Where both plaintiff and defendant agreed that the substantive law of New Jersey governed, and where that law required submitting to the jury the disputed issue of whether the decedent died as a result of the inherently dangerous nature of the work being performed, was the Court of Appeals justified in disregarding the law of New Jersey by redetermining the issue on appeal and setting aside the decision of the jury?

2. Does not the opinion of the Court of Appeals in the case *sub judice* conflict with decisions in the courts of the State of New Jersey as well as with decisions from other circuits?

3. Has not the Court of Appeals deviated so widely from the accepted course of judicial review as to make necessary the granting of a writ of certiorari?

Statutes and Regulations Involved

None.

Statement

This is a negligence action for wrongful death originally commenced by the plaintiff in the Superior Court of New Jersey (R3). Defendant removed the cause to the United States District Court for the District of New Jersey on the sole ground of diversity of citizenship (R5).

The decedent, plaintiff's husband, was killed while working on a pipeline construction job in Bayonne, New Jersey

(R14). He was employed by Construction Service Company, a sub-contractor of the defendant (R255). His death was occasioned by the bursting of a hose through which compressed air was being conducted into a pipe which decedent was testing. (R118). At the time of his death decedent was working at the bottom of a trench approximately 16 to 17 feet in depth (R107), about 4 to 5 feet in width (R28) and about 3,000 feet in length. (R18). The bottom of the trench contained approximately 2 to 4 feet of ground water (R93), and the trench itself contained shoring consisting of metal jacks running across its width at varying heights (R413, 108). The trench was so close to an existing concrete bridge abutment that there was concern that the bridge itself might collapse (R44).

Decedent's job at the time of his death consisted of testing the pipeline which had already been laid in the trench (R19). The pipeline being tested actually consisted of two pipes each 12 inches in diameter and 3,000 feet in length (R19). The pipeline test consisted of forcing compressed air from a compressor into the pipe until the pressure in the entire 3,000 feet of pipe reached 100 pounds per square inch (R19). The pressure in the pipeline had reached at least 98 pounds per square inch when the air hose burst (R338) causing what was described as a "loud explosion" (R106) or a "loud blast" (R351). Approximately 15 minutes later after the debris settled decedent's body was found at the bottom of the trench with a "hole in the side of his head" (R117; 118; 97). The air hose had burst at a point where it had been previously mended (R32, 100, 53). The mend had been made by using a smooth piece of pipe instead of a grooved hose mender (R189). This type of splice produced an unsafe union (R187).

The trial in the District Court consumed six days (R429). Plaintiff predicated her case upon the theory that decedent, at the time of his death, was engaged in work which

was inherently dangerous and that as a result, defendant, as prime contractor, was legally responsible for decedent's death even though it had entrusted the work to a sub-contractor. The case was submitted to the jury upon this theory, and the jury returned a verdict for plaintiff in the sum of $85,000.00.

The Court of Appeals for the Third Circuit reversed the judgment and directed the District Court to enter judgment in favor of the defendant.

REASONS FOR GRANTING THE WRIT

POINT I

The decision of the Court of Appeals conflicts with applicable State law.

The District Court submitted to the jury the issues of inherent danger of the activity in question and the causal connection between the inherent danger and decedent's death with a full and complete charge (R393, 394, 395). After deliberation the jury returned a verdict for plaintiff. The Court of Appeals in reversing the determination of the jury stated that the cause of decedent's death "stemmed not from the job itself but * * * from the causal or collateral negligence of persons engaged in it under particular circumstances" (A9a).

What the Court of Appeals did was to redetermine a disputed issue of fact which had been properly submitted to the jury and to arrive at a conclusion at variance with the decision of the jury. In so holding, the Court of Appeals has usurped the province of the jury and has thereby acted in conflict with the substantive law of New Jersey.

In *Majestic Realty Associates v. Toti Contracting Co., Inc.*, 30 N. J. 425, 153 A. 2d 321 (Sup. Ct. 1959), it was stated that:

"* * * where the minds of reasonable men might differ as to whether the activity contracted for the landowner is inherently dangerous or involves a peculiar risk of harm to others unless special precautions are taken, the issue is for jury determination. Whalen v. Shivek, supra, 93 N. E. 2d at page 400. On the facts of this case, as outlined above, we have no hesitancy in saying that such course should have been pursued."

In *Araujo* v. *New Jersey Natural Gas Co.*, 62 N. J. Super. 88, 162 A. 2d 299 (App. Div. 1960) cert. den. 33 N. J. 328, 164 A. 2d 380 (Sup. Ct. 1960), an accident occurred where gas pipes were laid in a ditch 33 inches in depth. The trial court dismissed the suit at the conclusion of plaintiff's case. On appeal the Appellate Division held that the inherently dangerous activity doctrine applied and that the case should have been submitted to the jury for determination.

Decisions such as these are examples of the well established rule of the New Jersey courts that the issue of proximate cause of an injury and other such factual issues are to be determined not by the court, but by the jury. As stated in *Vaduro* v. *Yellow Cab Co. of Camden*, 6 N. J. 102, 107, 77 A. 2d 459 (Sup. Ct. 1950):

"Where, as here, there is a factual dispute as to the events and circumstances which caused the injuries, proximate cause is a jury question."

Furthermore, the determination of a jury on a factual issue is, under the law of New Jersey, entitled to great weight. As stated in *Mead* v. *Wiley Methodist Episcopal Church*, 23 N. J. Super. 342, 358, 93 A. 2d 9 (App. Div. 1952):

"* * * Regardless of what factual findings we might reach as the result of our review of the evidence, we

are not permitted, under the cases, to substitute our judgment for that of the jury on a fact issue. To do so would be an invasion of the prerogative of the jury and would defeat the constitutional right of trial by jury to which the plaintiffs are entitled."

The Court of Appeals, it is respectfully submitted, has deviated from the accepted course of judicial review. It has considered the record and has substituted its judgment for that of the jury on a fact issue.

POINT II

The decision of the Court of Appeals is in conflict with decisions of other Circuits.

In *Sun Oil Co.* v. *Kneten*, 164 F. 2d 806 (5th Cir. 1947), a workman, who had been scalded by steam while performing work in a boiler, died as a result. The Court of Appeals held that whether decedent was killed while engaged in inherently dangerous work as well as the issue of proximate cause of decedent's death "are questions over the answers to which the minds of reasonable men might differ, which were properly submitted to the jury".

Likewise, in *Person* v. *Cauldwell-Wingate Co.*, 176 F. 2d 237 (2nd Cir. 1949) which involved death by electrocution of a linesman who was installing electricity in an army camp, the Court held that the inherently dangerous nature of the work and its proximate relationship to decedent's death were issues for jury determination.

It has been held that even where factual issues are "close", that "does not justify either the District Court or this court usurping the function of the jury. The fundamental and sacred right of a citizen to jury trial 'should be jealously guarded by the courts.'" *Carter* v. *Schooner Pilgrim*, 238 F. 2d 702 (1st Cir. 1956). See also *Columbia*

Box & Lumber Co. v. Drown, 156 Fed. 459 (9th Cir. 1907); *Missouri, K. & T. Ry. Co. v. Byrne*, 100 Fed. 359 (8th Cir. 1900).

Finally, in passing, it may be noted that the Court of Appeals in the instant case has also held contrary to its decision in *Watt v. Pennsylvania Railroad Company*, 255 F. 2d 854, 855 (3rd Cir. 1958) wherein it is stated that questions of fact are for the jury and become:

> "* * * an issue of law for the court only in those cases where the 'contra hypothesis is not fairly admissible.'
> * * *
>
> "* * * We are faced here with a disputed issue of fact which we are not free to redetermine in this court. That the jury's verdict necessarily involved some degree of speculation and conjecture is no basis for a new trial. As was stated in Lavender v. Kurn, supra, 327 U. S. at page 653, 66 S. Ct. at page 744, '(A) measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.' "

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FEINBERG, DEE & FEINBERG,
Attorneys for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,659

LUCILLE A. BREECE, administratrix *ad prosequendum* of the Estate of Jerry C. Breece,

Plaintiff-Appellee,

v.

J. F. CHAPMAN & SON, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 19, 1961

Before:

McLAUGHLIN, KALODNER and HASTIE,

Circuit Judges.

Opinion of the Court

(Filed April 17, 1962)

By McLAUGHLIN, *Circuit Judge.*

Defendant appeals from a plaintiff's judgement in this tort death case.

Appendix A.

On November 21, 1959 plaintiff's decedent was the foreman (its "expert on the job", as Construction's project manager described him) for Construction Service Company, a subcontractor on a New Jersey State Highway construction project in Bayonne, New Jersey. Defendant was the general contractor for the work.

Under the terms of the contract between the Highway Department and the Chapman company the latter was required to subcontract the removal and relocation of fuel oil pipelines, owned by Bayonne Industries, Inc., and lying in the path of the new highway, to a "member in good standing of the Pipeline Contractors Association, Dallas, Texas," such subcontractor to be approved by the owner of the pipelines. The subcontractor was to work under the supervision of the State Highway Engineer and the owner. In accordance with its contract, defendant subcontracted the work to Construction Service Company.

The subcontracted work consisted of the digging up and removal of four buried 8" pipelines and the laying of twin buried 12" pipelines elsewhere in their stead. The latter entailed the digging of a long trench which, due to the contour of the land and under the contract specifications, extended at points to depths of more than fifteen feet passing very close to an overhead bridge abutment. After laying the heavy one ton 12" pipe sections and welding them together, the subcontractor had to test the pipeline for leakage. The contract provided:

> "Leakage Testing to test the tightness of field joints, shall be performed under a test pressure of 100 psi held steady for 20 minutes. * * *
>
> "Test pressure shall be supplied by compressed air. If the test is performed on the entire lines, compressed air, but no gauges will be supplied by Bayonne In-

dustries Inc. If the pipeline subcontractor chooses to test portions of the line, compressed air and gauges shall be furnished by the subcontractor."

It was during one of those tests that decedent was killed. At the time, the twin pipeline had reached 3,000 feet in length and was laying at the bottom of the muddy trench near the concrete abutment to an overhead bridge; the State's engineers were afraid of the possibility of a collapse of the bridge. In preparation for this, the second test, one end of the second twin pipeline was capped and completely sealed while the other end was capped with a plug containing a pipe nipple, a gate valve which could be closed manually when the pressure inside the pipeline reached 100 psi, and an air gauge to determine when that pressure was reached. Having chosen to test the pipelines in portions, the subcontractor had to furnish its own equipment under the quoted terms of the contract. To supply the compressed air, the subcontractor's own rubber hose was connected from the pipe nipple to a large compressor standing at ground level. The compressor was freely lent the subcontractor by the defendant. The subcontractor's hose was originally fifty feet in length but, sometime prior to the accident, it had broken and was spliced together both before the first and this second test of the pipeline by some unknown employees of the subcontractor. The splicing was done haphazardly; the metal tube inserted into the broken ends of the hose was smooth, not serrated to permit the two holding clamps to work effectively. Moreover the tube was not inserted into the ends of the hose a sufficient distance, and the subcontractor did not use a check valve to prevent air from rushing out of the pipeline in the event the hose or its couplings broke.

Appendix A

After the preparations were completed, the decedent descended to the bottom of the trench and the compressor was started. Within fifteen or twenty minutes, when the pressure in the pipeline reached 98 psi, the operator of the compressor heard a "popping" sound and stopped the compressor. Apparently unable to hear the sound himself due to the noise of the compressor's operation at the bottom of the trench, decedent climbed a ladder out of the trench and was told by the operator what he had heard. Decedent concluded that it "was nothing", instructed the operator to restart the compressor, and again descended into the trench. Shortly thereafter, the splice came apart with an explosive noise. The air compressed in the pipeline rushed out of the broken end of the hose attached to the pipeline hurling a large quantity of mud, shoring material and other debris out of the trench. That broken end snaked about in the narrow confines of the trench, struck and killed decedent.

At the end of plaintiff's case, defendant moved to dismiss the complaint and enter judgment in its favor on the ground that the proofs presented did not warrant the claim going to the jury. It was argued on behalf of the plaintiff that the entire surroundings of the project made the work inherently dangerous. The court denied the motion "at this time". After the defense evidence had concluded, the plaintiff withdrew her theories of liability as to the defective compressor and retention of control by Chapman. This left, as stated by her attorney, "* * * the theory of the dangerous, inherently dangerous activity as the plaintiff's basis for recovery in the action."

The defense then moved for judgment on the ground that plaintiff had failed to offer evidence sufficient to go to the jury on the inherently dangerous activity issue. The trial court in taking the motion under advisement and per-

mitting the question to be submitted to the jury stated "I think the test is whether or not the operation is of an inherently dangerous nature, of a nature to which necessarily there attaches great danger." The plaintiff agreed with this thought of arguing " * * * that the inherently dangerous nature of the operation was found in the total circumstances of the job as I have indicated before."

The court charged "This defendant may not be found responsible unless the work which the subcontractor was doing was by it very nature inherently dangerous." The jury returned twice for instructions re "inherently dangerous". On its second appearance the court charged "If an employee of the Construction Company is negligent and that negligence is the proximate cause of the injuries sustained, and the work itself is inherently dangerous, then the negligence of the Construction Company is attributable to the prime contractor, or the defendant in this case." Thereafter the jury rendered a verdict in favor of the plaintiff.

On the motion n.o.v. it was argued that the activity had not been shown to be inherently dangerous, that the cause of the accident had been the breaking of the poorly mended hose. The court correctly interpreted that argument to " * * * say that the danger arose not from the nature of the work but from the fact that the subcontractor used an improper tool * * * which the prime contractor had no reason to suspect he would use. * * * And that of itself the operation of digging the ditch and testing was not inherently dangerous." The court in denying the motion said:

> "Now it seems to me that, as you say, we must go back to the time of the inception of the work, the making of the contract. At that time it was evident that the pipeline was to be laid and tested. There was

no particular length set at which the pipe must be tested, and therefore it certainly was not impossible to contemplate that it might be three thousand feet or a thousand feet. There was the idea that the ditch would extend in some places, you say, to fifteen or seventeen feet. There was the further idea that it would be close to this abutment or bridge. Now you seem to say that the danger to the abutment was something which would not make this inherently dangerous, but I think that danger to the abutment is inseparable from danger to the general operation.

"I think that ultimately the question of fact as to whether or not this was an inherently dangerous activity is a question for the jury, but only if reasonable minds in operating on the same facts could disagree.

"No matter what my personal opinion might be I think that there was a question upon which reasonable minds might disagree and I shall therefore deny your motion in both respects."

It is properly agreed that New Jersey substantive law governs. Both sides further agree that the Majestic Associates, Inc. v. Toti Contracting Co. litigation is controlling here. There the Appellate Division in 54 N.J. Super. 419, 431, held that what distinguishes inherently dangerous activities from others "* * * is the probability that injurious consequences will attend their performance even if reasonable care is exercised." In the affirmance of that decision the New Jersey Supreme Court stated that inherently dangerous "* * *" signifies that danger inheres in the activity itself at all times, so as to require special precautions to be taken with regard to it to avoid injury. * * * The elaborate monographs on the subject appearing in 23

Appendix A

A.L.R. 984 and 1084 (1923), after referring in great detail to the many instances of judicial use of 'inherently dangerous' distill therefrom as a basic connotation that the term imports a danger which is *incidental to and characteristic of the work itself, and not one which arises solely from the means and methods of its performance.*' 23 A.L.R. at page 1095." 30 N.J. 425, 435 (1959). (Emphasis supplied). And at page 438 it says "The mere recital of the nature of the work and the surroundings demonstrate its inherent danger * * *."

Though there was some atmospheric talk about inherent danger in connection with the depth of the ditch, its proximity to the bridge abutment, the use of the pipe in such a deep ditch and the presence of the water those circumstances never came into the orbit of this accident or bore the slightest relationship thereto.[1] Nor was the pressure testing established as inherently dangerous. It was regarding this that the primary affirmative effort was made to develop a jury question. Jerome Polaner, a professor in the mechanical engineering department of Newark College of Engineering testified as an expert on behalf of the

[1] It is plaintiff's contention that the dangers involved in these additional circumstances, although not remotely connected with her husband's death, were properly considered by the jury. But these *unrealized* dangers are immaterial and supply no causal connection between any inherent danger and Breece's death. The inherent danger doctrine is applicable only when the *realized* dangers were inherent in the activity causing the injury which in fact occurred. The injury must be "caused by negligence in a particular detail of the work which in *itself* is * * * inherently dangerous." Restatement, Torts, §427, comment a. (Emphasis supplied.) Plaintiff's expert evidence proved that the type of air testing operation conducted in this case was *not*, in itself, inherently dangerous. See *Gibilterra* v. *Rosemawr Homes*, 19 N. J. 166, 172 (1955). Compare *Majestic Realty Associates, supra*, 54 N. J. Super. at 434-435.

plaintiff. The court asked him "But would the operation, simply the operation of raising the pressure to a hundred pounds per square inch inside the pipe to which the tube is attached—would that be an inherently dangerous operation?" The witness finally answered "Possibly". Asked by the court if under the explicitly stated job conditions "* * * would the operation, simply the operation of raising the pressure to a hundred pounds per square inch inside the pipe to which the tube is attached, would that be an inherently dangerous operation?" The witness again finally answered "Possibly". He made it very clear that it was the use of the improperly spliced pipe that made the testing dangerous. On cross-examination he reiterated that it was the failure to use the serrated pipe mender that differentiated the method used by the subcontractor in the pressure test from the standard or customary operations.[2]

Counsel for appellee also assert in their brief that "The contract between the defendant and the Highway Department under which the work in question was being performed recognized that 'extraordinary precautions' were 'required to complete the pipeline relocations safely and properly * * * *'". The full text in the contract reveals that this concerns the owners of the property involved. The contract reads:

> "The low specific gravity, volatibility and combustability of the fluid pumped through the lines, dictates extraordinary precautions and cooperation with the owner during the execution of the relocations * * *.
>
> * * *

[2] Cutter, Construction Service's project manager, testified that the hundred pounds pressure per square inch was "not a high pressure for testing a pipeline, no." He said that pipeline test pressures "can go from a hundred pounds to twelve hundred pounds, and I guess even higher than that."

Appendix A

"The Contractor is cautioned that available right of way and available working space makes it necessary at some locations to construct the relocation in close proximity to the existing oil pipes.

* * *

"Because of the extraordinary precautions required to complete the pipeline relocations safely and properly, the Contractor and or subcontractor shall be responsible for giving notification of intention to begin or terminate any work of the Project, within five (5) feet of the existing or relocated fuel oil lines. Such notification shall be given to the owner in person or by telephone, and at least one hour prior to the beginning or termination of work."

Under the proofs—all of them—the sole cause of the unfortunate accident to decedent was the parting of the poorly repaired breach in the hose. That improper repair stemmed not from the job itself but "* * * from the causal or collateral negligence of persons engaged in it under particular circumstances." Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. at p. 435. It emanated "* * * solely from the means and methods of its performance." Idem p. 435. And the person directly responsible for the improper repair was the Construction Service foreman and expert on the particular work. It was one or more of his men who made the repair. It was decedent himself who came out of the trench after the operator had stopped the compressor on hearing a "popping" sound. It was the decedent who, being advised of the situation by the operator, concluded it was "nothing" and instructed him to restart the compressor. It was shortly after that that the splice gave way with the broken end of the hose striking decedent

who had returned to the trench. None of the other job conditions entered into that happening. The use of the unfit hose by deceased for Construction Service cannot be attributed to the Chapman job. It was simply and entirely the means and method used by Construction Service through its foreman Breece in performing its own specialized work.

Plaintiff's evidence shows that the routine compression test which took place was of itself neither actually or potentially dangerous. It is not contended that the selection of the hosing for that test offered any difficulty. Common sense, completely apart from deceased's skilled judgment, merely called for the use of sound hose, called for automatic rejection of defectively spliced hose. There has been no case in law or in justice of inherent danger proceeding from the use of the faulty hose, made out in the record before us against the defendant.

We have examined the other points raised by appellant. In view of our above stated findings there is no need of passing on these at this time.

The judgment of the district court will be reversed and the cause remanded for entry of judgment in favor of the defendant against the plaintiff.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13759

LUCILLE A. BREECE, administratrix *ad prosequendum* of the Estate of Jerry C. Breece,

vs.

J. F. CHAPMAN & SON, INC.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded for entry of judgment in favor of the defendant against the plaintiff.

Attest:

IDA O. CRESKOFF
Clerk

April 17, 1962

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 257.

LUCILLE A. BREECE, administratrix ad prosequendum of the Estate of Jerry C. Breece,
Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RULES CITED.

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Sup. Ct. Rule 19, 1 (b) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 257.

LUCILLE A. BREECE, administratrix ad prosequendum of the Estate of Jerry C. Breece,

Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented.

1. Where the substantive law of New Jersey applies and that law requires a direction of verdict or withdrawal of a case from the jury, or, in the alternative the setting aside of a verdict, and where, as here, there is an insufficiency of proofs to support the claim, did not the Court of Appeals properly reverse the judgment of the District Court and give judgment in favor of defendant?

2. Does not the action of the Court of Appeals conform with the decision of the courts of New Jersey, decisions of other courts of appeal and this Court?

Statement of the Case.

a. Introduction.

The State Highway Department of New Jersey, by contract (D Ex. 3; R377a, pertinent portions printed R418a-428a*) let to J. F. Chapman & Son, Inc., respondent herein, certain construction work in Bayonne, New Jersey, which included the relocation of buried fuel oil lines (R419a-426a). As a specialty item, this relocation was required to be subcontracted to a "pipeline subcontractor, who will construct the relocation under the supervision of the Engineer (State Highway Engineer, R252a-253a) and the owner (Bayonne Industries)" and had to be a member in good standing of the Pipeline Contractors Association, Dallas, Texas and "approved by the owner of the fuel oil lines" (D Ex. 3; R377a, Article 1.2.2, R419a, R251a-253a, R421a), with the "work of" their relocation "performed only by a pipeline subcontractor", with the prescribed "specific prequalification requirements" (D Ex. 3; R377a, R421a); the pipeline portion of the work consisted "of removal of four-8" fuel oil transmission pipelines and replacement with twin-12" pipelines" (D Ex. 3; R377a, Article 1.4.1, R420a), with details of work and the materials and methods, including "leakage testing" (D Ex. 3; R377a, R424a), to be employed particularly prescribed by the contract (D Ex. 3; R377a, R420a-426a); "Leakage testing to test the tightness of field joints" had to be "performed under a test pressure of 100 psi (pounds per square inch) held steady for 20 minutes" and could be performed on the entire lines or "limited to portions of the lines" at the

* Page references to the Record ("R") are to the Appendix filed with Respondent's Brief, as Appellant, in the Court of Appeals.

choice of the "subcontractor" (D Ex. 3; R377a, R424a); test pressure was to be supplied by compressed air and, when, by the choice of the "pipeline subcontractor", portions of the lines were to be tested, the "subcontractor" was to furnish the compressed air and gauges (D Ex. 3; R377a, R424a).

The subcontract for relocation of the pipelines, as required by the State Highway Department, was given to Construction Service Company (D Ex. 4, for identification—by consent not introduced into evidence R254a-255a; R11a-12a); the relocation work involved no other subcontractor (R15a) and was "a typical pipeline job" (R16a).

Petitioner's decedent (hereafter called "Breece") was Construction Service's "expert on the job" (R59a) and its job superintendent (R207a) or foreman (R334a).

During a leakage or "air" test of the lines (R306a), by Construction Service's employees, under the direction and control of Breece (R306a-307a, 332a, 335a), the subject accident occurred. Although Construction Service was required "to notify" the State Engineer and Bayonne Industries (owner of the pipelines) of the tests (R60a), testing was left by it "to the discretion and conduct of" Breece (R59a).

b. Issues at Trial.

While her complaint charged respondent with liability on the theories that it (1) had supplied defective equipment (First Count, par. 2, R3a) and (2) had "engaged in an inherently dangerous activity" (Second Count, par. 2, R4a), during trial, petitioner withdrew the first charge and any claim that respondent had exercised "control over

the activities of the Construction Service Company" and submitted her case only on the limited theory that respondent was liable because the work of the subcontract was "an inherently dangerous activity" (R375a-378a).

Respondent, in addition to a general denial, relied on the separate defenses of contributory negligence and assumption of risk (Answer, Second and Third Defenses, R7a).

c. Resume of Pertinent Proofs and Trial Proceedings.

1. Petitioner's Case.

The first step in Construction Service's required work was to dig a ditch (R16a-17a); the pipe came in 44 foot-lengths and 12 inches in diameter, was strung along the edge of and then placed in the ditch by a side mounted crane on a crawler tractor (R17a-18a); after the sections were welded together, material to prevent corrosion was applied to the joints (R18a); before backfilling the lines had to be tested, as aforesaid (R18a).

The double line of pipe was first tested (filled with 100 pounds of air psi for 20 minutes) when 1500 feet long (R18a). Each line was separately tested (R19a). At the time of the accident the lines were 3000 feet long,—tests were to be made at 1500 foot intervals (R19a). For testing, one end of the pipe was sealed and the other capped with a plug supplied with a pipe nipple through which air was admitted to the line (R20a), see P. Ex. 10 (R21a, R409a). The air came from a "standard" type compressor (R25a) located on ground level above the ditch (R23a-24a), and was transmitted to the line by a hose, purchased

(R32a) and owned (R31a) by Construction Service, attached to the nipple of the plug on the end of the line being tested (R21a-22a). This hose, "originally" a 50 foot piece "had been broken at some time in the middle and then spliced" (R32a), before it came "on the job" (R32a, 147a, 149a, 219a); the "splice" consisted of the hose ends having been slid over "a pipe with a nipple"—there was a two inch gap between the two hoses and you could see the metal pipe that was used to connect them (R149a) and clamps fastened the ends to the inserted pipe (R150a). At the time of the second test (when accident occurred) the hose was brought to the job from Construction Service's warehouse (R148a) and fastened to the pipeline by Construction Service's employees (R110a, 150a), who were aware of the splice (R110a), under Breece's supervision (R150a-151a).

Pressure in the pipeline was measured by a gauge attached to the nipple in the plug (R22a-23a) and admission of the air into the line was controlled by a gate-valve fastened to the plug (R37a-38a)—the type of valve used was "up to the discretion of" Construction Service, as the contractor "doing the job" (R66a).

At the time of accident, the ditch was 14-17 feet deep and 4-6 feet wide at the bottom (R28a, 93a) and shored with boards and supporting jacks (R28a, 95a-96a), as shown by P Ex. 12 (R27a, R413a). Ground and rain waters in the bottom of the ditch were variously estimated to have been 6-8 inches to 4 feet in depth, for which Breece "had pumps on the job with which he could remove water if it interfered with his operations" (R29a). The morning of the test, Breece inspected the pipelines and, finding water, had a pump obtained and had it "partly" pumped out by a

Construction Service employee, before starting the test (R142a-143a). The end of the ditch, where the test was being made, was sloped as to permit one to enter by walking down the slope (R29a, 93a, 96a, 101a).

While Breece was in the ditch, during the test and as compressed air was being sent into the line, the "splice" in the hose gave way; a broken end of the hose, from which air was escaping, struck Breece.

Petitioner's expert witness, Jerome Polaner, a professor of mechanical engineering, stated that the standard method of splicing requires a serrated pipe to be inserted into the hose ends to be joined a distance twice the inside diameter of the hose, with one or more clamps to fasten the ends to the pipe; as the use of plain pipe as an insert is not safe (R175a-177a). He believed plain pipe had been used to make the splice in the instant case (R187a-189a), but stated the clamps used were a type "used frequently in the field in splicing hose" (R185a).

Asked by the trial judge, if the use of a hose to convey compressed air to a pipeline, in a ditch, to obtain 100 psi pressure was "inherently hazardous or dangerous", Professor Polaner answered: "'Possibly'. The Court: 'Possibly; not inherently'. The Witness: 'That's correct'" (R190a). Asked if the testing of a "three thousand foot length of 12-inch pipe * * * by means of forcing a hundred pounds per square inch into the pipe * * * [assuming] that no check valve was used * * * that the operation * * * took place at the bottom of a trench that was approximately fifteen feet deep and anywhere from four to six feet wide * * * that the trench was supported by shoring that consisted of jacks pressing against pieces of wood

on the side of the trench and * * * that this air * * * was conducted into the * * * pipe by means of a fifty-foot piece of two inch inside diameter hose" was an "inherently dangerous operation", Polaner, pressed for a definitive opinion by the trial judge, stated that it was "possibly", as distinguished from "probably" or "inherently dangerous" (R190a-192a); he opined that it was only the use of an improperly spliced hose that was dangerous (R193a); pressed as to whether it was the "splice" in the hose which made the work dangerous, the trial court, observed that Polaner's "answer would be yes * * * he has already said that *if the tubing were not spliced and not weakened, then it was not inherently dangerous*" * (R198a-200a). Had it not been for Construction Service's failure to use serrated pipe to splice the hose, the work operation would have been "standard or customary" (R202a).

2. Respondent's Case.

Breece was "the field man" for Construction Service, in "charge" of inspection of the work (R281a). Construction Service used the compressor (R281a) and operated it through its employee, Barlics (R307a, 333a), who, the morning of accident, "made sure that the lines were secure at the compressor part, the hose, the air hose, and checked the machinery over and all to make sure that it was ready for running * * * It was" (R333a-334a) and, who, on orders from Breece, the job foreman, had started the compressor (R334a, 335a).

Breece and Raymond Max (state engineer's aide at the test) were in the trench when Barlics heard a "pop" and,

* Emphasis added.

as he "didn't know what it was from", he shut off the compressor (R337a). Breece came out of the trench and told Barlics more air was needed (R338a). Although told of the "pop", Breece said "that was nothing * * * to go over and start" the compressor again (R338a-339a), which Barlics did, as Breece was the "boss" (R339a). Ten minutes later there was "a loud noise like a blast" and the parted hose made a "hissing sound" as it whipped around in the trench (R339a, 340a, 343a).

3. Motions.

At the conclusion of petitioner's case, respondent moved for the entry of judgment in its favor on the grounds: the proximate cause of the accident was the claimed defective "splice in the hose—which was not respondent's nor in its control" (R226a, 229a); there was no showing that respondent had had knowledge of the claimed defect in the hose (R226a, 227a, 228a, 230a); Construction Service was a specialist, to whom the relocation of the pipelines had been given as required by respondent's contract with the State Highway Department (R231a); there was no showing that respondent was negligent in its selection or hiring of Construction Service; the mere superintendence by respondent of Construction Service's work for the purpose of seeing that the latter performed its undertaking did not constitute the exercise of such control as would disturb respondent's immunity for Construction Service's work performance (R232a-233a); Breece was an "expert" in the work (R231a); the proximate cause of the accident was the negligence of Construction Service and its employees (including Breece) in the performance of the contracted

work and in its supply and use of the defective hose and not the consequence of the work activity itself (R228a-230a, 234a); the contracted work activity itself was not inherently dangerous (R234a); and, Breece was not such innocent or third person as was the intended beneficiary of the "inherently dangerous activity" doctrine (R230a-231a). The motion was denied "at this time" (R249a).

At the conclusion of the entire case, respondent, again, moved for the entry of judgment in its favor, for the grounds earlier stated (R379a) and it further urged: Breece was not a third person or innocent bystander within the contemplation of the "inherently dangerous activity" doctrine, but the specialist and "boss", employed by Construction Service and charged with its performance of the contracted work activity (R380a); as conceded by petitioner's expert (Polaner), the work activity was not inherently dangerous and the accident had resulted only from the claimed improper splicing of the hose by Construction Service, a condition not caused nor brought about by respondent (R381a); the contracted work activity was not "inherently dangerous" *per se* and did not become so by reason of the negligence of Construction Service and its employees in the performance of their work. The trial judge without a determination of the motion (R385a), submitted the case to the jury (R390a-406a).

In the argument on the latter motion petitioner conceded: (a) that the accident was not caused by the depth of the trench (R383a), nor by its claimed proximity to a bridge abutment (R384a) and (b) that a work operation is not inherently dangerous for its negligent performance—petitioner limited her contention to the premise—"the test

is whether or not of itself the operation is of an inherently dangerous nature, of a nature to which necessarily there attaches great danger" (R384a).

4. Charge of Trial Court.

The pertinent portions of the instructions given the jury, which twice returned for further instruction (R402a, 404a), are:

> (a) Respondent's liability "depends on whether or not this operation was inherently dangerous" (R390a).
>
> (b) Adequate instructions related to respondent's denial that the work was inherently dangerous and the defenses of contributory negligence and assumption of risk (R390a, 391a, 392a, 395a, 396a, 397a).
>
> (c) Respondent's liability, if any, depended on findings that Construction Service had been negligent in the performance of an inherently dangerous operation (R397a).
>
> (d) "If an employee of [Construction Service] is negligent and that negligence is the proximate cause of the injuries sustained, and the work itself is inherently dangerous, then the negligence of the employee of [Construction Service] is attributable to the * * * defendant in this case." (R405a).

5. The Verdict.

The jury returned a verdict for petitioner against respondent, by a 10 to 2 vote (R406a).

6. Motions After Verdict.

Respondent moved to set aside the verdict and for entry of judgment in its favor in accordance with its motion for directed verdict, made at the close of the testimony on the grounds: petitioner had failed to establish a case sufficient to go to the jury (a) as to negligence on its part and (b) on the theory of "inherently dangerous activity" (R430a) and, in the alternative, moved the trial court to set aside the verdict and grant a new trial for the reasons that the verdict was against the weight of the evidence and the result of mistake, passion, partiality and prejudice (R430a).

On the hearing on the aforesaid motions, during which the trial court acknowledged that the case had been submitted only on the issue of "inherently dangerous operation" (R433a-434a), respondent urged the "subcontract" for relocation of the pipe lines was required by respondent's contract with the State Highway Department and was let to Construction Service as "experts" in that activity, with Breece as the expert in charge of the contracted work activity (R433a); petitioner's expert had limited himself to the contention that the contracted work was dangerous only because of the improper manner in which it was performed by Construction Service (R441a); the danger which caused the accident did not arise from the nature of the work to be done but from the use by Construction Service of an improper hose (R444a); the "inherently dangerous activity" principle applies only for the benefit of adjoining property owners or innocent bystanders and not to persons, such as Breece, who were not only interested in but in control of the very activity

(R444a-446a, 454a); and, the work activity had been performed at Breece's directions and within his discretion (R450a).

These motions were denied. (R456a, Memorandum, R463a).

7. Appeal to the Court of Appeals.

On respondent's appeal to the Court of Appeals, from the judgment entered on the verdict and the order denying respondent's motion to set aside the verdict and for a new trial, respondent contended: (a) the trial court had erred in its denials of respondent's motions for entry of judgment in its favor, made at the conclusion of petitioner's case, conclusion of entire case and after verdict, for the reasons that respondent had no status as respected the work activity out of which the accident arose, for which it had a duty of care which extended to Breece for its performance by Construction Service or its employees (including Breece) in a negligent manner; (b) its duty of care, if any, under its contract with the State Highway Department, was delegable under the proofs and law of the case and it was without liability to Breece, (1) as Construction Service, the independent contractor undertook the doing of the work without control over it by respondent, (2) the accident was not proximately the result of "inherently dangerous work operation", and (3) Breece, as the expert and boss in charge of the work and one to whom the asserted circumstances, dangers and risks were open, obvious, incidental to his employment and capable of appreciation, was not a person to whom the benefits of the "inherently dangerous activity" extended; (c) in the absence of any genu-

ine issue, as to any material fact the trial court erred in not entering judgment for respondent on its several motions; (d) "probability" and not "possibility" is the necessary quality of proof to sustain the asserted claim and verdict; (e) the jury disregarded or misunderstood, the trial court's instruction that petitioner could not recover if Breece "knew or should have known of the danger and in spite of that went ahead and assumed that risk" (R396a) or if Breece had been guilty of negligence which contributed to the happening of the accident (R395a); (f) that the exclusive inference permitted by the evidence was that Breece was or should have been aware of the asserted hazard and assumed same and, by acting as he did, was contributorily negligent; (g) the jury verdict was contrary to the weight of the evidence and the result of mistake, passion, partiality or prejudice; (h) the trial court so prejudicially erred in its instructions to the jury as to commit plain error.

The Court of Appeals, reversed the judgment of the trial court and directed the entry of judgment in favor of respondent (A1a-10a*). Following the established substantive law of New Jersey, which recognizes that the term "inherently dangerous" imports a danger which is incidental to and characteristic of the work itself and not one which arises from the means and methods of its performance, *Majestic Associates, Inc.* v. *Toti Contracting Co.*, 30 N. J. 425, 435, 153 A. 2d 321 (Sup. Ct. 1959), the Court of Appeals, from its review of the record, concluded (A9a-10a):

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* Page references to Opinion of Court of Appeals are to the Appendix to Petitioner's Petition.

"Under the proofs—all of them—the sole cause of the unfortunate accident was the parting of the poorly repaired breach in the hose. That improper repair stemmed not from the job itself but * * * from the causal or collateral negligence of persons engaged in it under particular circumstances.' Majestic Realty Associates, Inc. *v.* Toti Contracting Co., 30 N. J. at p. 435. It emanated * * * solely from the means and methods of its performance'. Idem. p. 435. And the person directly responsible for the improper repair was the Construction Service foreman and expert on the particular job. It was one or more of his men who made the repair. It was decedent himself who came out of the trench after the operator had stopped the compressor on hearing a 'popping' sound. It was the decedent who, being advised of the situation by the operator, concluded it was 'nothing' and instructed him to restart the compressor * * * none of the other job conditions entered into that happening. The use of the unfit hose by deceased for Construction Service cannot be attributed to the Chapman job. It was simply and entirely the means and method used by Construction Service through its foreman Breece in performing its own specialized work. "

Common sense, completely apart from deceased's skilled judgment, merely called for the use of sound hose, called for automatic rejection of defectively spliced hose. There has been no case in law or in justice of inherent danger proceeding from the use of the faulty hose, made out in the record * * * against the defendant."

In view of the above findings, the Court of Appeals had "no need" to pass on respondent's other points (A10a).

ARGUMENT.

Reasons in opposition to granting of the writ.

POINT I.

The decision of the Court of Appeals conforms with applicable State Law, decisions of other Courts of Appeal and this Court.

a. State Law.

In the absence of a genuine issue as to any material fact, the trial court must enter the judgment imposed in such circumstance. *Riley* v. *Weigand*, 18 N. J. Super. 66, 71, 86 A. 2d 698, 700-701 (App. Div. 1952); *Kaufman* v. *Pennsylvania R. R. Co.*, 2 N. J. 318, 324, 66 A. 2d 527, 529 (Sup. Ct. 1949); *Van Derbeck* v. *Conlon*, 41 N. J. Super. 574, 579, 125 A. 2d 531, 533 (App. Div. 1956). A verdict may properly be set aside as contrary to the weight of the evidence, even though the state of the evidence would not justify the direction of a verdict at the close of the proofs. *Franklin Discount Co.* v. *Ford*, 27 N. J. 473, 490, 143 A. 2d 161, 170 (Sup. Ct. 1958). A trial judge in passing on a motion for directed verdict may not weigh the evidence, but, in passing on a motion to set aside a verdict as against the weight of the evidence, must weigh the evidence to determine whether the verdict was one which might reasonably have been reached. *Mt. Adams & E. P. Inclined Ry. Co.* v. *Lowery*, 74 F. 463, 476 (6 Cir. 1896), cited with approval in *Franklin Discount*, *supra*, 490.

On appeal, the appellate tribunal may interfere and substitute its own judgment for that of the jury "if the verdict is so far contrary to the weight of the evidence as

to give rise to the inescapable conclusion of mistake, passion, prejudice or partiality". *Wytupeck* v. *Camden*, 25 N. J. 450, 466, 136 A. 2d 887, 896 (Sup. Ct. 1957). Also, *Colacurcio Contracting Corporation* v. *Weiss*, 20 N. J. 258, 262, 119 A. 2d 449, 452 (Sup. Ct. 1955): "* * * if there was no evidence to sustain the judgment, there is error in matter of law therein remediable on appeal * * *" *Kelly* v. *Forman*, 129 N. J. L. 41-42, 27 A. 2d 862 (Sup. Ct. 1942).

The trial judge and the Appellate Court "are controlled by the same criterion. The inquiry for each is whether the verdict is against the weight of the evidence * * *" *Hager* v. *Weber*, 7 N. J. 201, 212, 81 A. 2d 155, 160 (Sup. Ct. 1951).

b. Other Courts of Appeal.

Federal courts, in a diversity case (as here), should follow the sufficiency of evidence rule of the law of the forum. *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 166 F. 2d 908, 917, 918 (3rd Cir. 1948), certiorari denied 334 U. S. 846, 68 S. Ct. 1516; *Sampson* v. *Channell*, 110 F. 2d 754, 758 (1 Cir. 1940), certiorari denied, 310 U. S. 650, 60 S. Ct. 1099.

The right of federal courts to direct a verdict for insufficiency of evidence has been acknowledged in *Buffalo Insurance Company* v. *Spach*, 277 F. 2d 529 (5th Cir. 1960); *Peterson* v. *Exum*, 283 F. 2d 499, 502 (9th Cir. 1960); *Carter* v. *Schooner Pilgrim*, 238 F. 2d 702, 705 (1st Cir. 1956); *Sun Oil Co.* v. *Kneten*, 164 F. 2d 806, 809 (5th Cir. 1947).

c. This Court.

This court has reversed a court of appeals, which affirmed the trial court's denial of defendant's motions, not-

withstanding the verdict and for new trial, for insufficiency of proofs. *New York, New Haven and Hartford R. Co.* v. *Henagan*, 364 U. S. 441, 442, 81 S. Ct. 198, 199 (1960).

In *Johnson* v. *New York N. H. & H. R. Co.*, 344 U. S. 48, 73 S. Ct. 125 (1952), where, as here, the trial court reserved on defendant's motion for directed verdict and denied motions to set aside the verdict and to have judgment entered in accordance with defendant's motion for directed verdict and, in the alternative for new trial (Rules of Civil Practice) Rule 50(a) and (b), the Court of Appeals was held to have authority to enter judgment for defendant where a timely motion for judgment notwithstanding is made in the district court, as was done in the case now before the court.

The evidence must be sufficient to support the verdict, *Myers* v. *Reading Co.*, 331 U. S. 477, 485, 67 S. Ct. 1334, 1339 (1947) and, on a finding that the evidence was insufficient, the court of appeals has authority to direct a judgment of dismissal on the merits, *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 661, 55 S. Ct. 890, 891 (1934).

POINT II.

There is no reason for Certiorari.

Since the Court of Appeals did not render a decision in conflict with applicable state law, other courts of appeal, or depart from the accepted and usual course of judicial proceedings (S. Ct. Rule 19, 1(b)), and its decision is in conformity with decisions of this Court, there is no need for this Court to intervene and exercise its supervisory prerogatives.

Conclusion.

For the foregoing, the Petition for Writ of Certiorari should be denied and, if granted, respondent should be afforded opportunity to be heard on the "other points" raised, but not determined, on its appeal to the Court of Appeals.

Respectfully submitted,

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